Office-Supreme Court, U.S.
FILED
JUN 27 1983
ALEXANDER L. STEVAS,

No. 82-1840

In the Supreme Court of the United States

OCTOBER TERM 1982

HENRY J. KIRKSEY, ET AL., APPELLANTS

v.

STATE OF MISSISSIPPI AND UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

JESSICA DUNSAY SILVER
MIRIAM R. EISENSTEIN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the three-judge district court abused its discretion in denying appellants' application to intervene in this action for a declaratory judgment under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

TABLE OF CONTENTS

	Page
Statement	1
Argument	3
Conclusion	7
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Allen v. *State Bd. of Elections*, 393 U.S. 544 4

Apache County v. *United States*, 256 F. Supp. 903 5

Brennan v. *Silvergate District Lodge No. 50*, 503 F.2d 800 5-6

Brotherhood of R.R. Trainmen v. *B. & O.R.R.*, 331 U.S. 519 3

Busbee v. *Smith*, Civ. No. 82-0665 (D.D.C. Mar. 22, 1982) 5, 1a

City of Dallas v. *United States*, 482 F. Supp. 183 ..... 5, 6

Cutting, Ex parte, 94 U.S. 14 6

Morris v. *Gressette*, 432 U.S. 491 ..... 4, 6

Port Arthur v. *United States*, No. 81-708 (Dec. 13, 1982) 6, 7

Richmond v. *United States*, 422 U.S. 358 ..... 6, 7

Senate of California v. *Smith*, No. 81-2767 (D.D.C. Apr. 23, 1982) 5

South Carolina v. *Katzenbach*, 383 U.S. 301 4

Page

Statutes, regulations and rules:

Voting Rights Act of 1965, 42 U.S.C. (& Supp. V) 1971 *et seq.* :

Section 2, 42 U.S.C. 1973 3
Section 4, 42 U.S.C. 1973b 5
Section 5, 42 U.S.C. 1973c 1, 2, 3, 4, 5

28 C.F.R. :

Section 51.35 1
Section 51.36 4

Fed. R. Civ. P. :

Rule 24 ..... 2, 3
Rule 24(a) 5
Rule 24(a)(2) 3
Rule 24(b) 5

Miscellaneous:

3B J. Moore & J. Kennedy, *Moore's Federal Practice*, (2d ed. 1982) 3

In the Supreme Court of the United States

OCTOBER TERM 1982

No. 82-1840

HENRY J. KIRKSEY, ET AL., APPELLANTS

v.

STATE OF MISSISSIPPI AND UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of this Court's Rules, the United States moves that the judgment of the district court be affirmed.

STATEMENT

1. On February 8, 1982, the Governor of Mississippi signed S.B. 2430, 1982 Miss. Laws ch. 305, and H.B. 315, 1982 Miss. Laws ch. 306, the state's legislative reapportionment plan based on the 1980 Decennial Census (Complaint at 5-6).[1] On July 1, 1982, the State submitted the Acts to the Attorney General for preclearance under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c (Complaint at 6). On August 25, 1982, the Assistant Attorney General for the Civil Rights Division wrote to the State requesting additional information to enable him to determine, pursuant to Section 5, whether the redistricting Acts lacked racially discriminatory purpose and effect (J.S. 4).[2]

[1] We are lodging the relevant pleadings with the Clerk of this Court.

[2] See 28 C.F.R. 51.35.

Without furnishing the requested information, the State of Mississippi on September 20, 1982, filed the present suit in the United States District Court for the District of Columbia seeking a declaratory judgment preclearing the legislative reapportionment plan under Section 5. The United States filed an Answer on November 1, 1982, stating that the initial submission had never been completed; as a consequence, the Attorney General lacked knowledge and information sufficient to form a belief with respect to the plaintiff's allegations that the bill lacked discriminatory purpose and would have no discriminatory effect (Answer paras. 11, 13, 18, 21).

After filing this suit, Mississippi furnished the additional information requested by the Attorney General. On November 22, 1982, the Assistant Attorney General for Civil Rights informed Mississippi by letter that no objection to the plan would be interposed.[3] That letter was appended to a joint motion filed on December 2, 1982, by Mississippi and the government to dismiss the preclearance suit.

Meanwhile, on November 18, 1982, appellants, black voters residing in Mississippi, filed a motion for leave to intervene as defendants pursuant to Rule 24, Fed. R. Civ. P., and proffered an Answer in Intervention. In their joint motion to dismiss, the parties opposed the appellants' motion to intervene on the ground that the case was now moot. On January 12, 1983, the district court denied the appellants' motion to intervene, and dismissed the suit (J.S. App. 1a-2a).

---

[3]Because not all the time provided by Section 5 for the Attorney General to interpose an objection had run, the letter also stated that the Attorney General reserved the right to object should further information come to his attention during the remainder of the 60-day statutory period. No *such objection was interposed.*

ARGUMENT

1. Appellants contend that their application to intervene in this Section 5 case pursuant to Rule 24, Fed. R. Civ. P., was improperly denied.

Although the cases cited by appellants (J.S. 15-16 n. 8) demonstrate that permissive intervention by third parties in Section 5 preclearance suits has been liberally allowed, denial of permissive intervention is reviewable only for abuse of discretion. *Brotherhood of R.R. Trainmen* v. *B. & O. R.R.*, 331 U.S. 519 (1947); 3B J. Moore & J. Kennedy, *Moore's Federal Practice* para. 24.15, at 24-164 to 24-165 (2d ed. 1982). That no such abuse took place here is so apparent as to render the question presented insubstantial and unworthy of plenary review by this Court.

a. Appellants contend (J.S. 15-20) that they have a right to intervene under Rule 24 because they assert "an interest relating to the property or transaction which is the subject of the action and [they are] so situated that the disposition of the action may as a practical matter impair or impede [their] ability to protect that interest" (Fed. R. Civ. P. 24(a)(2)). It is clear from Section 5 of the Voting Rights Act of 1965 and the decisions of this Court that private litigants do not have a legally cognizable "interest" in the substantive outcome of any particular Section 5 submission. While the implementation of the Mississippi reapportionment plans undeniably may affect the voting rights of the black citizens of Mississippi, appellants and other voters may vindicate those rights through litigation under the Constitution or Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973.

Section 5 of the Voting Rights Act of 1965 provides two methods for preclearance of proposed voting changes by covered jurisdictions: either (l) by administrative action of the Attorney General or (2) by declaratory judgment of the District Court for the District of Columbia in a suit brought by a covered jurisdiction in which the Attorney General is

the statutory defendant. See *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966). This Court has inferred a private right of action under Section 5 for the limited purpose of assuring that no person in a covered jurisdiction will be subjected to a voting change that has not been precleared as required by that Section (*Allen* v. *State Bd. of Elections*, 393 U.S. 544 (1969)), but no private right of action has been created by Congress or inferred by this Court to challenge a preclearance granted either by the Attorney General or the district court.

On the contrary, in *Morris* v. *Gressette*, 432 U.S. 491 (1977), this Court specifically rejected the contention that private parties have protectable Section 5 "rights" beyond those recognized in *Allen, supra*. In *Morris*, this Court held that private parties could not challenge the Attorney General's decision to preclear a voting change. The Court recognized that Section 5 procedures afford special protections, unavailable in traditional litigation, for minority voting rights by preventing implementation of a voting change until a covered jurisdiction has carried its burden of proving the absence of discriminatory purpose and effect. The Court nevertheless concluded that "[w]here the discriminatory character of an enactment is not detected upon review by the Attorney General, it can be challenged in traditional constitutional litigation." 432 U.S. at 506-507.

Of course, the views of private parties in the Section 5 preclearance process are helpful. Accordingly, the Attorney General invites the views of affected voters in considering a submission (28 C.F.R. 51.36). Such views will also usually be helpful to the district court if it must decide whether to preclear a reapportionment by a declaratory judgment. But private parties have no more *right* to participate in a

preclearance suit than they do to seek judicial review of administrative preclearance.[4]

b. The district court did not abuse its discretion in denying permissive intervention under Rule 24(b), Fed. R. Civ. P., for the case was moot as between the parties. Appellants argue that by dismissing as moot, the district court deprived them of a case in which to intervene. Where the parties have no "case or controversy," however, it is surely appropriate to refuse to continue the suit merely in order to provide other persons a vehicle for permissive intervention. As the district court recognized in rejecting a substantially identical argument in *City of Dallas* v. *United States,* 482 F. Supp. 183, 186 (D.D.C. 1979):

> Nothing in the Act, however, vests this court with jurisdiction to retain a moot case to accommodate the intervenor's quest for a forum in which to test a voting plan that has already been approved by the Attorney General under § 1973c [Section 5].

2. Because appellants' application to intervene in this case was denied, they never became parties to the action and have no standing to appeal from the judgment. *Brennan* v.

---

[4]Appellants' sole authority for their claim that they are entitled to intervene as of right is an unpublished order of March 22, 1982, in *Busbee* v. *Smith,* Civ. No. 82-0665 (D.D.C.) (App. A, *infra*). The reference in that order to Fed. R. Civ. P. 24(a) is evidently a typographical error, because the court relies on the fact that the federal defendants have acquiesced in *permissive* intervention. In contrast, in *Senate of California* v. *Smith,* No. 81-2767 (D.D.C. Apr. 23, 1982), the district court, after extensive analysis, decided that there is no intervention as of right in a Section 5 proceeding. See also *Apache County* v. *United States,* 256 F. Supp. 903, 906-907 (D.D.C. 1966) (no intervention as of right under earlier version of Fed. R. Civ. P. 24(a) in suit under Section 4 of the Voting Rights Act of 1965, 42 U.S.C. 1973b—providing for suspension of literacy tests in certain areas until D.D.C. issues declaratory judgment that test not used discriminatorily—on ground (*inter alia*) that public, not private, right involved).

Silvergate District Lodge No. 50, 503 F.2d 800, 803 (9th Cir. 1974); cf. *Ex parte Cutting*, 94 U.S. 14 (1876). Accordingly, this Court need not consider their contention that the Attorney General does not have the authority to preclear a voting change once an action for a declaratory judgment has been filed in the District Court for the District of Columbia. Moreover, appellants are seeking review of the Attorney General's preclearance of a plan—exactly what *Morris* v. *Gressette, supra,* precludes. But even if appellants' argument were viewed as an attack on the denial of permissive intervention on the ground that the case could not properly be considered moot, the argument is without merit.

Acceptance of appellants' argument would mean that once a covered jurisdiction submits a voting change to the District Court for the District of Columbia for a declaratory judgment, that jurisdiction and the Attorney General are locked into an adversarial contest that must inevitably proceed to judgment on the merits. Such an analysis would preclude the State from voluntarily withdrawing the suit, just as it would preclude the government from confessing judgment. Indeed, it would prevent what in fact happened in *City of Dallas, supra,* where the city decided to abandon its effort to clear its first plan, passed another, and had the second plan cleared administratively. Presented with the agreement of the parties, the district court declared the case moot.

Appellants' insistance on litigation despite the agreement of the parties is not supported by this Court's decisions in *Port Arthur* v. *United States*, No. 81-708 (Dec. 13, 1982) or *Richmond* v. *United States*, 422 U.S. 358 (1975). Those cases do not, as appellants contend (J.S. 8-11), hold that once litigation is underway, agreement between the government and the plaintiff cannot divest the district court of

jurisdiction. In neither case did the Attorney General purport to preclear a plan while litigation was underway. In each case, the government had interposed an objection to the initial plan, and the district court had also denied preclearance; the government simply took a litigative position in each case with respect to relief. In neither case did the government claim that its position rendered the case moot, and in neither did this Court address that issue.

In any event, the facts of the present case are quite different from those in either *Richmond* or *Port Arthur*. Here, while a lawsuit had been filed, issue was never really joined. The government's answer did not deny that the submitted plans should be precleared. In response to the State's motion to expedite, the Attorney General pointed out that the best way to "expedite" would be for the State to complete its submission by coming forward with the necessary additional information. The district court set up the litigating schedule to accommodate completion of the administrative submission, and when that submission was completed, the Attorney General precleared the plan. In this situation, the district court's dismissal of the case was perfectly proper.

CONCLUSION

The order of the district court should be affirmed.

Respectfully submitted.

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

JESSICA DUNSAY SILVER
MIRIAM R. EISENSTEIN
Attorneys

JUNE 1985

APPENDIX

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

GEORGE D. BUSBEE, et al.,	:	
Plaintiffs	:	
v.	:	Civil Action 82-0665
WILLIAM FRENCH SMITH,	:	
et al.,	:	
Defendants	:	
WILLIAM C. (BILLY)	:	
RANDALL, JR., et al.,	:	
Applicants for Intervention	:	

[Filed Mar. 22, 1982]

ORDER

Upon consideration of the Petition of William C. (Billy) Randall, Jr., *et al.*, to intervene as Defendants in this action, Plaintiffs' opposition thereto, the acquiesence [*sic*] of the Federal defendants to permissive intervention, and the entire record herein, it is by the Court this 22nd day of March, 1982,

ORDERED, that the Petition for Intervention pursuant to Fed. R. Civ. P. 24(a) be and hereby is GRANTED subject to the compliance by Intervenor-Defendants with all outstanding orders of the Court in this action.

s/s AUBREY E. ROBINSON, JR.

Aubrey E. Robinson, Jr.
United States District Judge
For the Court

(THIS PAGE INTENTIONALLY LEFT BLANK)